

the question of breach of this particular statutory duty I am of the view that we need concern ourselves only with Machine No. 2, and not the other two machines.

I would therefore with respect agree with the learned judge's finding in this respect as well.

The fourth ground having been abandoned by the appellant, I need not dwell upon it. I would therefore dismiss this appeal with costs.

Lee Hun Hoe C.J. (Borneo) and Abdul Hamid J. concurred.

Appeal dismissed.

Solicitors: *K.L. Rekhray & Co.; Shearn Delamore & Co.*

YUSON BIEN & ANOR. v. BANKERS TRUST CO. LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 22 & June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal
No. 164 of 1977]

Contract — Rectification — Mutual Mistake — Sale of land — Intention of parties.

In this case the appellant had applied to rectify an agreement by including two pieces of land described as Lots 40 and 85 situated at Temple Street, Malacca on the ground of mutual mistake. On the facts it appeared that the respondents, the executors and trustees of the estate of Chua Yau Keng deceased had obtained a court order for the sale of all or any of the immovable properties of the estate by public auction or by private contract. They caused a valuation of the properties to be prepared and this stated that the two lots had been sold and no longer belonged to the estate. The respondents relied on the valuation reports and never intended to sell the two lots, which they considered did not form part of the estate. The appellants had agreed to buy the properties belonging to the estate. In the draft agreement the two lots were included by mistake but subsequently they were deleted and the agreement signed and duly engrossed. Later it was discovered that only part of the two lots had in fact been sold and that the two lots still belonged to the estate. The learned trial judge dismissed the claim of the appellants and they appealed to the Federal Court.

Held: the learned trial judge was right to refuse rectification as there was no equitable ground for making an order of rectification. There was no question of mistake on the part of the respondents and so the claim of mutual or common mistake could not succeed.

Cases referred to:-

- (1) *Tucker v. Bennett* (1887) 38 Ch. D. 1 at p. 9.
- (2) *Shelburne v. Inchiquin* (1784) 1 Bro. C.C. 338, 341.
- (3) *Foscelyne v. Nissen* [1970] 2 Q.B. 86 at p. 98.
- (4) *Marquis of Breadalbane v. Marquess of Chandos* (1837) 2 My. & Cr. 711.
- (5) *Lloyd v. Stanbury* [1971] 2 All E.R. 267; [1971] 1 W.L.R. 535.
- (6) *Goody v. Baring* [1956] 1 All E.R. 11, 12.
- (7) *Smith v. Mansi* [1962] 3 All E.R. 857.
- (8) *Earl v. Hector Whaling Ltd.* [1961] 1 Lloyd's L.R. 459, 471.
- (9) *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662.
- (10) *Tucker v. Bennett* (1887) 38 Ch. D. 1, 9.
- (11) *Swaisland v. Dearsley* (1861) 29 Beav. 430.
- (12) *Tamplin v. James* (1880) 15 Ch. D. 215, 217.

A HIGH COURT.

N. Ramachandran (P. Devadas) with him for the plaintiffs.

Dato Wong Seng Chow for the defendants.

Cur. Adv. Vult.

Ajaib Singh J. (after stating the facts and the evidence continued): On the evidence before me I am not at all satisfied that the plaintiffs have proved their case against the defendants. The court no doubt has jurisdiction to rectify an agreement which because of a common mistake of fact does not substantially represent the real intention of the parties when the agreement is finally drawn up. But there must be a prior common and continuing intention of the parties as to their real intention right up to the time of the written agreement and the burden of proving this intention is upon the plaintiffs. As to the burden and standard of proof which is required in such a case I can do no better than to quote *Cheshire and Fifoot's Law of Contract*, Eighth Edition, at page 219 as follows:—

"The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified.⁽¹⁾ As regards the standard of proof required all that can be said is that the claim will fail unless the common intention upon which it is based is proved by convincing evidence. It is not necessary that the evidence should be 'irrefragable' as Lord Thurlow once suggested,⁽²⁾ or that it should settle the question 'beyond all reasonable doubt' as is demanded by the criminal law.⁽³⁾ If the negotiations leading up to the execution of the written instrument were vague and inconclusive, so that it is impossible to ascertain what the parties really meant, then the writing represents the only agreement that has been concluded, and there is no antecedent and common intention upon which rectification can be based.

Moreover, it must be shown that the alleged common intention, though once undoubtedly reached, continued unchanged down to the time when the instrument was reached. Proof that the parties varied their original intention and that the instrument represents what they finally agreed is fatal to a suit for rectification.⁽⁴⁾

Finally, it must be emphasized that the issue relates not to the individual intention of the parties, but to their common intention. If the defendant can satisfy the court that he understood the agreement to be exactly what was stated in the written instrument, rectification will be excluded."⁽⁵⁾

In my view the plaintiffs have with regard to the two disputed lots failed to prove by convincing evidence that it was the common intention of the parties that the two lots should form part of the properties to be sold. The negotiations leading to the final agreement of March 27, 1965 were vague and inconclusive insofar as the two disputed lots are concerned. Earlier when the draft agreement was drawn up both Mr. Keith Sellar and Messrs. Laycock & Ong as well as the defendants were aware of the two valuation reports in which the two lots were not valued at all and were stated to have been sold. The omission on the part of the defendants and their solicitors to comment on the draft agreement which listed the two disputed lots in the schedule as well as their omission to comment on Mr. Keith Sellar's letter that the two lots appeared to have been sold do not prove anything. Silence is not equivalent to acceptance of any fact nor does it conclusively prove any intention. So too with regard to the defendants' letter dated February 21, 1966 (Exhibit P5A) addressed to the tenant of 15

Portuguese Street, Teoh Joo Tee, PW3, to the effect that the house had been sold to Heap Huat Rubber Co. Ltd. The estate of the deceased consisted of several landed properties in Malacca some of which fairly large in extent and I am inclined to think that the letter of February 21, 1966 was of a very cursory nature which was sent out not very long after the sale of the estate so that in all probability the writer of the letter hardly checked whether the house stood on any part of the two disputed lots or on some other lot belonging to the estate. Also by this time as far as the defendants were concerned the entire estate had already been sold — the two disputed lots as stated in the valuation reports to have been sold in 1954 and the remaining properties sold to the plaintiffs on March 27, 1965. Anyway the statement in this letter (Exhibit P5A) is far from sufficient in proving an antecedent agreement between the parties that the two disputed lots were to be included in the properties to be sold.

The plaintiffs were throughout stressing the fact that the correspondence between the parties referred to the entire landed properties of the estate and that the properties were to be sold as one lot. This is true but there is clear evidence that as far as the defendants were concerned the properties which they intended to sell were those listed and valued in the two valuation reports. They had these valuations well in mind throughout the negotiations culminating in the impugned agreement of March 27, 1965. When they refused Yong Seet Fun's offer of \$102,500 on June 29, 1964 the defendants had pointedly remarked that it was inconceivable how they could entertain this offer when the valuation of the properties made by Messrs. Lim Keng & Co. was \$137,516 (Exhibit P1 page 33). Again in the letter dated November 12, 1964 while inquiring if Yong Seet Fun was prepared to increase his offer of \$102,500 Messrs. Laycock & Ong specifically drew the attention of Messrs. Sault, Keith Sellar & Co. that as "you are aware Messrs. Lim Keng & Co. on June 23, 1964 valued the properties at \$137,516 and our clients do not feel that in the circumstances they could enter into a private sale for the sum of \$102,500. The only alternative therefore would be to put the properties up for public auction" (Exhibit P1 page 36). It must be stressed here that in both valuation reports the two disputed lots were listed but were not valued on the ground that they had been sold. Mr. Keith Sellar must be taken to be aware of the position throughout. After all he had himself got the reports from the valuers on the instructions of Messrs. Laycock & Ong and he was also acting as the agent for the defendants' solicitors as well as for the plaintiffs. He had as early as January and February 1962 informed by letter to Messrs. Laycock & Ong and Messrs. Allen, Gledhill & Ball (Exhibit P2 dated January 11, 1962 and Exhibit P3 dated February 10, 1962) that from the valuation report of November 11, 1961 it appeared that the two disputed lots no longer belonged to the estate. In the event of a public auction being conducted the valuation reports would have been in the forefront for being in the position of trustees the defendants had to put up an up-to-date valuation report. In all these circumstances therefore and on the evidence before

A me I am of the view that insofar as the defendants were concerned there was no mistake and no common intention with the plaintiffs and no antecedent agreement with them that the two lots were to form part of the properties in the sale.

B It was pointed out by Mr. Ramachandran that after the sale of the estate to the plaintiffs the defendants had asked their rent collector to stop collecting rents of the deceased's properties on the ground that all the estate property had been sold. Later however when it was discovered that parts of the two disputed lots were not sold the rent collectors were asked to collect rents again from the house which stood on one of the two disputed lots. Mr. Ramachandran submitted that this showed that the intention of the defendants was to sell all the estate including the two disputed lots. Here again I do not think that this conclusively establishes any antecedent agreement or common intention that the two lots were to be sold to the plaintiffs when negotiations were going on for the sale of all the landed properties of the estate. The defendants were all along acting in the belief that the two lots had already been sold as stated in the valuation reports. They had only a few months prior to the agreement of March 27, 1965 specifically drawn the attention of Messrs. Sault, Keith Sellar & Co. to the latest valuation report which clearly showed that the two lots did not belong to the estate. Therefore instructing their rent collectors not to collect rent on the ground that all the estate had been sold was not inconsistent with the defendants' stand. The two disputed lots had been sold as mentioned in the valuation report of June 23, 1964 and now on March 27, 1965 the remaining lots were sold to the plaintiffs so that nothing was left from which to collect any rent. Later upon realising that the two lots had in fact not been sold the defendants were doing no more than asserting their legitimate right over the lots by instructing the rent collectors to resume collecting rents from the two disputed lots.

G The evidence to establish that the plaintiffs themselves had the specific intention to include the two disputed lots was also vague and inconclusive. The first plaintiff was prepared to speculate on the price of \$140,000 and when he later heard that the two disputed lots had been inadvertently listed in the draft agreement he was prepared to buy the remainder of the properties at the same price of \$140,000. He made no attempt to get the price reduced. Therefore whatever intention the first plaintiff may have had with regard to the properties his intention clearly was to buy the remainder of the properties at the price of \$140,000 when the final agreement was signed on March 27, 1965.

H After considering all the evidence adduced in this case I cannot say that the plaintiffs have proved their case against the defendants. They have failed to prove by convincing evidence, or even sufficiently on a balance of probabilities, that the parties had an antecedent agreement and a common intention that the two disputed lots were to form part of the properties to be sold by the defendants to the plaintiffs. Their claim is accordingly dismissed with costs.

From the above dismissal the plaintiffs appealed to the Federal Court.

FEDERAL COURT.

N. Ramachandran for the appellants.

Dato Wong Seng Chow for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): This appeal is against the refusal of the learned judge to rectify an agreement by including two pieces of land described as Lots 40 and 85 situated at Temple Street, Malacca on ground of mutual mistake.

The contention of appellants is that prior to the engrossing of the agreement the intention of the parties was the sale and purchase of all the properties of the estate. The mistake only came to light subsequently when a tenant sought to pay rent to respondents. It was then found that Lots 40 and 85 were still owned by the estate. Only parts of the two lots were sold previously. The records at the Land Registry were not accurate. For the respondents, it was contended that the trustees were guided by the valuation reports. They were advised as early as 1962 that the two lots were sold in 1954 and did not form part of the estate. As far as they were concerned the question of mistake did not arise.

The learned judge found clear evidence that respondents intended to sell only those properties listed and valued in the two valuation reports. He stressed that in both valuation reports Lots 40 and 85 were mentioned but not valued as the two lots were found, on search, to have been sold. Mr. Keith Sellar of Messrs. Sault, Keith Sellar & Co. who acted as solicitors for appellants and agents for Messrs. Laycock & Ong of Singapore must be presumed to be aware of the position. Yet, in preparing the first draft agreement he took upon himself to include the two lots. This will become clear when the evidence, particularly the various documents, are looked into. This case shows that arrangements whereby solicitors could act for both sellers and buyers should be discouraged because of conflict of interests. Thus, in *Goody v. Baring*⁽⁶⁾ Danckwerts J., as he then was, said:—

"It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser."

He reiterated his view in the Court of Appeal in *Smith v. Mansi*.⁽⁷⁾ If there was any misunderstanding the solicitors for appellants must bear a certain measure of blame. Reference to the facts which are not in dispute would reveal that there was no question of mistake.

For convenience and better understanding, the facts will be set out in chronological order. Respondents are the executors and trustees of the estate of Chua Yan Keng, deceased. Appellants were the buyers. The properties were eventually conveyed to their nominees, Heap Huat Rubber Co. of Singapore. On April 28, 1958 the respondents obtained a court order for the sale of all or any of the immovable properties of the estate by public auction or by private contract. The properties listed in the schedule to the order included Lots 40 and 85. In 1961 Messrs. Lim

Keng & Co. were instructed to value the properties of the estate as respondents intended to sell the estate by public auction. A valuation report was made (See page 261 of the Appeal Record). Although the report made reference to Lots 40 and 85 the two lots were not valued. In the report the valuers stated their reasons:—

"It would appear that Lots 85 and 40 no longer belong to the estate of Chua Yan Keng.

These lands would appear to have been conveyed to one Chua Wan Neo in 1954, and the block of three storey buildings standing on these lands do not appear to belong to the estate of Chua Yan Keng either."

The properties excluding Lots 40 and 85 were valued at \$121,131.25. The report was sent to Messrs. Laycock & Ong. In their letter dated January 11, 1962 (see page 293 of the Appeal Record), Messrs. Sault, Keith Sellar & Co. stated, concerning Lots 40 and 85, as follows:—

"It would appear these properties no longer belong to the estate. We enclose herewith a copy of our search in connection with these two lots."

Nowhere in their letter did they seek clarification on these two lots. Yet, on February 10, 1962 they wrote to Messrs. Allen Gledhill & Ball, Malacca repeating the above passage and saying they were seeking clarification. No public auction took place.

Subsequently, on April 2, 1964 Yong Seet Fun offered to buy all the estate properties by private contract. (See page 272 of Appeal Record). By a letter dated April 13, 1964 (see page 273 of Appeal Record) Messrs. Sault, Keith Sellar & Co. suggested to their Singapore principal that:—

"In case we could get our prices, will it not be better to dispose of all the properties in one lot and we may thereby be able to overcome all the complications herein such as graves, squatters, occupation, etc."

Respondents indicated interest in disposing of the properties in one lot. So, in 1964 Messrs. Sault, Keith Sellar & Co. again instructed Messrs. Lim Keng & Co. to make a revaluation of the properties they made earlier. In their report dated June 23, 1964 they referred to their earlier report concerning Lots 40 and 85 and stated they were not valuing the two lots. (See page 281 of the Appeal Record). The report was sent to Messrs. Laycock & Ong. Yong Seet Fun offered to buy the properties at \$102,500 which they rejected. He increased the offer to \$125,000. (See page 291 of Appeal Record). Respondents instructed their solicitors to say that "they are not disposed to sell the properties below \$140,000." (See page 292 of Appeal Record).

Up to this stage it was clear what were the properties respondents wanted to sell and at what price. Keith Sellar who was dealing with the matter could not say he was not aware of the position. When Yong Seet Fun dropped out of the picture another offer for \$140,000 was made by appellants who gave a cheque for 10% of the purchase price. This emerged clearly in the cross-examination (see page 37 of the Appeal Record) when he said:—

"An offer was then made for \$140,000 — Bundle A page 1 — letter dated December 2, 1964 — same file reference and same subject matter. Reply at page 2."

The letter dated December 2, 1964 is at page 167 of

the Appeal Record and confirmed the offer made by appellants. The reply mentioned by him is at page 168 of the Appeal Record and dated December 9, 1964. The reply was that "our clients are disposed to accept the offer subject to contract but are seeking views of the beneficiaries." Respondents were concerned about the graves and wanted to be sure that an alternative burial place could be found. They wanted the removal of graves to be taken care of in the contract.

Following this a draft agreement was prepared. This is where the misunderstanding came in. Keith Sellar stated in evidence at page 38 of Appeal Record in these words:—

"The two lots were included in the first draft following the orders of court. The first draft came back without deleting the two lots by the Bankers Trust Company Ltd. The subsequent deletion was done in my office and the final agreement signed on March 7, 1965 without the two lots. I had drawn up the first draft on the basis that Lots 85 and 40 were part of the estate. Messrs. Laycock & Ong never wrote back to say that these two lots were never part of the estate. I followed the order of court and put the two properties in the schedule in my first draft as I had no definite instructions that they did not form part of the estate."

It is rather strange that Mr. Keith Sellar should say that Messrs. Laycock & Ong never wrote back to say that the two lots were never part of the estate because he had never asked them specifically for clarification. If he had done so they would have checked the titles or deeds of conveyance in respect of the two lots. Also, the two valuation reports made clear that Lots 40 and 85 were sold in 1954. Before engrossing, a further search made in the Land Registry on January 19, 1965 showed that the two lots had been sold. This merely revealed the position Messrs. Sault, Keith Sellar & Co. already knew from the valuation reports and their letter dated January 11, 1962 referred to earlier in which they enclosed a copy of their search. They had no authority to include Lots 40 and 85 in the agreement because at that time they were aware from the valuation reports and search that Lots 40 and 85 no longer belonged to the estate. In fact, respondents accepted that Lots 40 and 85 had actually been sold in 1954 to Chua Wan Neo. So that when 1st appellant was informed that the two lots were sold he said it was just bad luck. In the event, the two lots were deleted and the agreement duly engrossed. It is true respondents wanted to dispose of all their properties. At that stage to respondents it meant without Lots 40 and 85 which they understood to have been sold and to form no part of the estate. They could not sell what they did not have at the time. Thus, they had no intention to sell the two lots. The two lots were never in their minds.

Looking at the facts up to the time when the agreement was engrossed it seems clear that respondents relied on the valuation reports and never intended to sell Lots 40 and 85 which they considered to have been sold and, therefore, did not form part of the estate. The fact that respondents instructed their rent collectors to stop collecting rent and that a tenant who wanted to pay rent was told that the property had been sold to Heap Huat Co. Ltd. merely confirms respondents' conviction that they owned no more immovable property. It is immaterial that they

later asserted their right and instructed their rent collectors to collect rents on the two lots when they realised the two lots in fact still belonged to the estate.

The terms of proposal of respondents were unambiguous and unmistakable and the answer of the appellants when the agreement was engrossed was an unequivocal and unconditional acceptance. Consequently, appellants were bound in the absence of fraud or warranty however clearly they might afterwards make it appear that they were labouring under a mistake in their acceptance of the proposal. They cannot be allowed to escape from the effect of their agreement by merely showing that they understood the terms in a different sense from that which the terms bear in their legal effect. In *Earl v. Hector Whaling Ltd.*⁽⁸⁾ Hauman L.J. agreed with Simonds J. in *Crane v. Hegeman-Harris Co. Inc.*⁽⁹⁾ "that you do not need a prior contract, but a prior common intention." The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified: *Tucker v. Bennett*.⁽¹⁰⁾ If the evidence is such as to satisfy one that that common intention did not appear in the written document then there is a case for rectification.

Before us objection was taken by respondents that appellants were arguing on the basis of common mistake which was never pleaded. An application to amend the pleadings by deleting the word "mutual" from the statement of claim was refused. There is no question of mistake on the part of the respondents. So that mutual and common mistakes cannot succeed. In *Swaisland v. Dearsley*⁽¹¹⁾ defendants alleged that he had misunderstood the particulars of sale. Sir John Romilly M.R. said:—

"If there appear on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about."

This statement was approved by Baggallay L.J. in *Tamplin v. James*.⁽¹²⁾ In that case he remarked:—

"But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous."

In the particular facts of this case since there is no equitable ground for making such an order it would be inequitable for the court to order rectification. With respect, the learned judge was right to refuse rectification. I would dismiss the appeal with costs. The deposit is to be paid to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Devadas & Co.; Shearn, Delamore & Co.*